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BY HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: MM Docket 98-176
RM-9363
Killeen and Cedar Park, Texas

Dear Ms. Salas:

Transmitted herewith, on behalf of LBJB Broadcasting Company, L.P., are an original and four copies of its "Reply Comments" in the above-referenced proceeding.

Should any further information be required concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump
Counsel for LBJB Broadcasting Company, L.P.

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 98-176
Table of Allotments,) RM-9363
FM Broadcast Stations.)
(Killeen and Cedar Park, Texas))

Directed to: Chief, Allocations Branch

REPLY COMMENTS

LBJB Broadcasting Company, L.P. ("LBJB"), licensee of KLNC(FM) (formerly KAJZ(FM)), Killeen, Texas, by its attorneys, hereby respectfully submits its Reply Comments in the above-captioned proceeding with regard to the "Comments of GulfStar Communications Killeen Licensee, Inc.," filed November 16, 1998. With respect thereto, the following is stated:

1. In the Commission's *Notice of Proposed Rule Making* in this proceeding, DA 98-1939, released September 25, 1998 ("*NPRM*"), the Commission proposes reallocation of Channel 227C from Killeen to Cedar Park, Texas, as that community's first local aural transmission service and modification of the license for KLNC(FM) to specify the new community. GulfStar Communications Killeen Licensee, Inc. ("GulfStar") filed Comments opposing the proposed change in community of license. The basis for GulfStar's opposition is not the allotment's short-spacing to LBJB's KLBJ-FM, a pre-1964 grandfathered short-spacing which GulfStar concedes "can

perhaps be justified.” (Comments at 4.) Rather, GulfStar argues that the proposed allotment at Cedar Park should be rejected because it would continue the three other short-spacings associated with the current Killeen allotment, all involving Section 73.215 move-ins which LBJS did not create or consent to. Thus, GulfStar is objecting to the proposed change in community of license in spite of the fact that it maintains the *status quo* with regard to the number of short-spaced allotments contained in the FM Table of Allotments, and because of action taken by third parties over which LBJS had no control.

2. As an initial matter, it should be noted that GulfStar is the licensee of a station also licensed to Killeen and, accordingly, competes directly with KLNC(FM) for listeners and advertising revenues. As the licensee of another Killeen station, it might appear that GulfStar would have an incentive to support, rather than oppose, a proposal which would remove a competing station from Killeen and move it to another community. But GulfStar’s filing is instead motivated by its desire to prevent KLNC(FM) from enhancing its competitive position in the Austin market, where GulfStar’s and LBJS’s stations compete head-to-head.¹ This anti-competitive purpose, not GulfStar’s rhetoric about the integrity of the FM band, drives GulfStar’s objection here.

3. While it is true that, like the current Killeen allotment, the proposed Cedar Park allotment would be short-spaced to three stations in addition to LBJS’s KLBJ-FM,

¹ Entities related to or having common ownership with GulfStar also are licensees KVET(AM), KVET-FM, KASE(FM), and KXAN-TV, Austin, Texas, as well as KFMK(FM), Round Rock, Texas, which serves the Austin market.

GulfStar is not the licensee of any of those stations. GulfStar, therefore, could not itself suffer any adverse consequence as a result of the reallocation. None of the stations actually involved in the short-spacings has submitted any opposition to the proposed change. Indeed, the licensees of two of those stations, KSTV and KKZN, filed comments in support of the proposed reallocation. It is clear, therefore, that GulfStar's primary interest in this proceeding is to delay and hinder LBJ's attempt to enhance its station and improve its ability to compete in the market. The Commission has long made it clear that it will not tolerate pleadings filed primarily for the purpose of impeding competition and will summarily dismiss such filings. Such is the fate which should befall GulfStar's Comments. See *Suburban Community Policy*, 93 F.C.C. 2d 639 (1983), *recon. denied*, 56 RR2d 835 (1984), eliminating the policies due to the use by entrenched big city stations to forestall competition by "move ins."

4. GulfStar's Comments add nothing new to the basic policy debate as to whether the Commission should permit the reallocation of a short-spaced channel in a circumstance in which no new interference would be created and other public interest benefits would be realized. GulfStar's opposition to the proposed reallocation is based entirely upon the Commission's policy of preserving the integrity of the FM Table of Allotments by generally refusing to make any new short-spaced allotments. What GulfStar's argument fails to take into account, however, is that the proposed change in community of license is, in essence, not a "new" allotment, but rather merely a modification in community of an existing allotment.

5. Given that no technical modifications to the KLNC(FM) facilities are proposed herein, the proposed reallocation can have no impact whatsoever on the integrity of the Table of Allotments. Regardless of whether Channel 227C is allotted to Killeen or to Cedar Park, the allotment will be short-spaced. Even if the Commission were to deny the proposed change in community of license, there would be no decrease in the number of short-spaced allotments presently in the Table of Allotments. Likewise, if the Commission were to approve the modified allotment, there would be no increase in the number of short-spaced allotments. Thus, whatever action the Commission takes, the Table of Allotments will neither gain nor lose a short-spaced allotment. Additionally, the proposed community change will not create any new or additional short-spacings, nor will it affect the potential for interference between stations, which is the underlying rationale for having a Table of Allotments. *Millington, Maryland*, 45 R.R.2d 1689, 1690-91 (1979). Thus, the only impact on the Table of Allotments is that a new community would be specified for the Channel 227C allotment. In light of LBJS's showing that Cedar Park has a far more urgent need for its first transmission service than Killeen has for KLNC, to deny this substitution of communities would be to elevate form over substance in a manner contrary to the public interest.

6. GulfStar itself acknowledges that the Commission has waived the strict application of the spacing rules in Section 73.207 in certain circumstances. GulfStar further concedes the benefits of allowing broadcasters flexibility in order to serve their communities. Significantly, GulfStar does not argue that the policy articulated in *Newnan and Peachtree City, Georgia*, 7 FCC Rcd 6307 (1992) ("*Newnan/Peachtree*

City”) should be eliminated. Rather, GulfStar merely argues that, while the short-spacing between KLNC(FM) and KLBJ-FM is a pre-1964 grandfathered short-spacing, since the other short-spacings at issue here arose more recently, the *Newnan/Peachtree City* policy should not apply. GulfStar does not provide any reasoned basis for this distinction, however.

7. The same policy considerations apply whether a station became short-spaced due to the adoption of the Table of Allotments in 1964 or due to the actions of other stations which have, pursuant to the FCC’s rules, moved closer and become short-spaced since that time. In neither instance did the licensee of the station in question take any action on its own part, nor was any consent to the changed circumstances required. Thus, the same fairness considerations apply to both situations, as in both cases, the station has had its short-spaced status imposed upon it involuntarily.

8. GulfStar’s argument in opposition may be summarized as “the sky is falling.” GulfStar claims that, if changes in community of license are allowed in circumstances such as those in the instant case, there will a large number of new, short-spaced allotments sought by stations which have become short-spaced. What GulfStar overlooks in this argument, is that, by definition, these theoretical stations which might seek “new” allotments, are **already** short-spaced. Thus, once again, there would be no change in the *status quo*. Whether or not stations which have become short-spaced are allowed to seek new communities of license, the total number of short-spaced allotments will remain unchanged.

9. Moreover, while GulfStar repeats such phrases as “exponentially expand” and “large numbers” (Comments at 4), it provides no quantitative analysis of how many stations might potentially be involved.² Clearly, therefore, its argument is based upon mere suppositions rather than any hard evidence. In point of fact, however, the proposal made by LBJs would have a limited application. The circumstances of this proceeding are limited to a case in which a licensee of an existing short-spaced station proposes to change community of license without otherwise changing the station’s technical facilities through the rule making proceeding. Such a proposal is in sharp contrast to one in which a petitioner might seek to drop in a truly new, short-spaced allotment, thereby adding to the total number of short-spaced allotments.

10. LBJs’s proposal also must be contrasted with a proposal under Section 1.420(g) of the Commission’s Rules, which would involve an actual improvement in technical facilities, thereby increasing the potential for interference between stations. The Commission did not establish the FM Table of Allotments to be an inflexible standard in and of itself. Maintaining the integrity of the Table of Allotments has the underlying purpose of preserving an interference-free FM service and is not itself the ultimate goal. A proposal under Section 1.420(g) to upgrade a station’s facilities must increase that station’s potential for causing interference to other stations and degrading service to the public. On the other hand, a mere change in community of license has

² LBJs notes that the *Peachtree/Newnan* policy was adopted in 1992, yet, LBJs is not aware of any ground swell of proposed community switches relying on the precedent over the past six years.

no potential to change in any way the amount of interference caused by the station. Therefore, it is to be expected that these different types of proposals might be afforded different regulatory treatment.

11. GulfStar speculates that licensees who change communities of license will subsequently file applications to move to different sites, and many of these applications will invoke Section 73.215. Such musings, however, are nothing more than pure speculation. The Commission has recently reiterated that it will not consider in an allotment proceeding conjecture as to future application plans. *Warrenton and Enfield, North Carolina and LaCrosse and Powhatan, Virginia*, DA 98-1495, released July 31, 1998. Moreover, GulfStar's theory presents only one possibility for potential future applications. It is just as likely that a licensee which has obtained some flexibility through a community change may be able to move away from stations to which its station is now short-spaced. Thus, despite GulfStar's gloomy prognostications, it is entirely possible that applications which might follow community changes would result in a net decrease in the number of short-spacings. It is impossible to predict accurately everything which might transpire in the future if unspecified stations make unspecified changes in community of license and then follow with applications to make further unspecified changes. Accordingly, the Commission cannot rely upon such rampant speculation as a basis for its decision-making.

12. The proposed change in community of license would result in a preferential arrangement of allotments. If Channel 227C is reallocated to Cedar Park as proposed, that community will gain its first local aural transmission service. This arrangement of

allotments would trigger priority three set forth in *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88, 92 (1982). As set forth in LBJs's Comments, Cedar Park is a growing community in need of a local broadcast outlet.

13. The benefit of providing a first local service would be achieved without any countervailing public interest detriment. As set forth above, the proposed change would have no adverse effect on the integrity of the Table of Allotments, as the reallocation would, in essence, preserve the *status quo*. While the name of the community having a short-spaced allotment would change, the total number of short-spaced allotments would remain the same. Thus, the proposed reallocations would have no impact on the integrity of the FM band. Therefore, LBJs urges the Commission to adopt LBJs's proposal.

Respectfully submitted,

LBJs BROADCASTING COMPANY, L.P.

By: 
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December 1, 1998

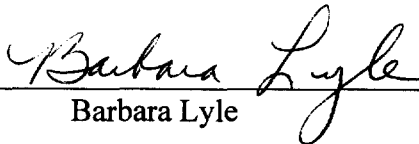
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CERTIFICATE OF SERVICE

I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a copy of the foregoing "Reply Comments" was sent this 1st day of December, 1998, by first-class United States mail, postage prepaid to:

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